IN THE

Supreme Court of the United States

October Term, 1957

No. 331

ROY JONES, *Petitioner*

vs.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR THE PETITIONER

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LIST OF AUTHORITY

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In response to the petition for certiorari and in the brief filed on behalf of the government in this court the contention is made for the first time that the seizure of the contraband by the Alcohol Tax Unit Agents was legal because they entered the home of the petitioner without lawful warrant in order to arrest him on probable cause to believe that he had committed a felony.

The record in this court, consisting of the transcript of the testimony of the witnesses on the hearing of the motion to suppress before the district judge, the findings of fact and conclusions of law, and the opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the District Court, are completely devoid of any testimony, contention or finding that the entry by the agents of the government into the home of the petitioner was for any reason other than to search his home for contraband in the belief that the agents had the authority to do so without a search warrant on the theory that, having probable cause to believe that an unlawful distillery was in operation, they did not need a search warrant even though they had ample opportunity and time to procure one. It is our understanding that the district judge upheld the validity of the search and seizure, and the circuit court affirmed, upon the theory that the federal agents had probable cause to believe that a felony was being committed inside the home of Roy Jones, and that, based on *United States v. Rabinowitz*, 339 U. S. 56, no search warrant was necessary if the agents had probable or reasonable cause to make the search and seizure without a warrant.[1]

The government, in its brief, does not contend that an entry may be made merely to search in the belief that offending articles are inside a building.[2] They now contend for the first time in this court that the evidence was admissible because the agents entered the home for the purpose of arresting petitioner without a warrant of arrest or to search on probable cause to believe that

1. See Rec. pp. 51, 55.

2. Brief of U. S. p. 10.

he had committed a felony. The contention now made by the government is without merit for three reasons.

First: The record fails to indicate that the federal agents making the search and seizure were acting with any such purpose in mind or that the district judge or the court of appeals so construed their acts.[3]

Second: The evidence clearly illustrates that the federal agents had ample opportunity to procure a warrant of arrest for petitioner at the time they obtained the daylight search warrant inasmuch as the probable cause for believing that he had committed a felony existed at the time they obtained the warrant to search his home.

Third: Although Alcohol Tax Unit agents have statutory authority to arrest persons whom they have probable cause to believe have committed a felony, Congress never has, and it is doubtful if they have the constitutional authority to, authorize the invasion of a home in order to make such an arrest.

FIRST: Record fails to indicate purpose of entry was to arrest.

None of the federal agents testified that they believed the petitioner was at home at the time they entered the house without a warrant. No witness claimed that Roy Jones was seen going in the house prior to the entry by the agents; nor did any of the agents ever testify that they entered the house for the purpose of finding and arresting the petitioner. On the contrary, Special Agent Langford was asked several times during his testimony what his purpose was in entering the house.[4] His reply

3. Rec. pp. 59, 63.

4. Rec. 46, 47.

on one occasion was that he was investigating. He had also appeared before the Commissioner in Gainesville that day to obtain a search warrant to search the premises and that was clearly the purpose in going back to the petitioner's home. (Rec. 4, 5.)

SECOND: There was ample opportunity to secure arrest warrant.

The government, in their brief, lays much emphasis on the theory that federal agents, having the power to arrest without warrant on reasonable cause to believe that a felony has been committed, may violate the privacy of a man's home at any time of day or night, without the aid or interposition of a detached magistrate, on a bare claim that at some time in the past the agent had reasonable cause to suspect that the occupant had committed a felony. Such a theory, if put into actual practice would reduce the fourth amendment to mere form of words without substance or meaning.

It is to be noticed, however, that the government in its brief fails to cite any cases from this court or any of the courts of appeals holding an arrest without warrant, but based on probable cause, to be legal where it is practicable for the arresting officer to procure a warrant of arrest and he offers no valid reason for his failure to do so. Warrants of arrest and warrants to search stand on similar footings. To procure either requires probable cause, supported by oath or affirmation. A warrant of arrest, when served on the defendant named therein authorizes a reasonable search of his person and the property under his immediate control as an incident thereto.[5] Likewise, a warrant to search, when properly

5. U. S. v. Rabinowitz, 339 U. S. 56.

executed and evidence of crime discovered, authorizes an arrest of the person found to be violating the law. A search of a home without warrant can only be legally made under exceptional circumstances or incidental to a lawful arrest on a valid warrant of arrest,[6] or where there is not enough time to procure a warrant. A valid arrest without warrant can only be lawfully made incidental to a valid search on a lawful warrant to search or under exceptional circumstances where for lack of a warrant there would be a failure of justice or the defendant is actually attempting to escape.

Judge Learned Hand, of the United States Court of Appeals for the Second Circuit, in writing the opinion for that Court in a case involving a search and seizure incident to an arrest without warrant, in the case of

UNITED STATES V. COPLON,
185 Fed. 2nd, 629, held:

> "The statute certainly requires a warrant when there is time to obtain one; the dispensation is limited to occasions when it is not safe to wait. The only excuse that is suggested is that Gubitchev might have made off with the papers, and to it there are two answers. First, the condition is not that evidence shall be likely to escape, but that the person to be arrested shall be. Second, if a warrant had been obtained, the incriminating papers could as well have been seized. We have no alternative but to hold that the arrest was invalid, and concededly that made the packet incompetent against her."

Other U. S. Circuit Court of Appeals rulings have recognized that arrests without warrant, based on reasonable

6. U. S. v. Jeffers, 342 U. S. 48.

cause, become unreasonable with the lapse of time after the probable cause first becomes apparent.[7]

In the brief filed by the government it is unequivocally stated that

> "The law is clear that an officer having lawful authority to arrest without a warrant may do so even though he had previously had sufficient information and time to get a warrant. United States v. Rabinowitz, 339 U. S. 56, 66."

We respectfully submit that such is not a correct interpretation of the Rabinowitz case, supra, inasmuch as the ruling in that case was based upon a search incidental to an arrest *upon a valid warrant of arrest* and not upon an arrest "without a warrant" as stated in the government's brief.[8]

THIRD: Right to arrest without warrant not authorize invasion of home.

The brief for the government also fails to cite any cases on the proposition that a federal agent, having the power to arrest on reasonable cause to believe that a felony has been committed, but not having a warrant of arrest, would be empowered to invade the privacy of a home in order to effect such an arrest.

A federal agent, having the authority to arrest for violating the liquor laws, maintains the lawful right to enter a home *to execute a valid warrant of arrest* where he has probable cause for believing the wanted person to be inside the house, but the law does not

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7. Poldo v. U. S. (9th Cir.) 55 Fed. 2nd, 866.
Hobson v. U. S. (8th Cir.) 226 Fed. 2nd, 890.

8. Brief of U. S., p. 9 and p. 18.

permit an entry into a house to arrest *without a warrant* of arrest or to search. While the federal statutes cited by the government in their brief are sufficient to authorize federal agents to make arrests without warrant in specified cases, the statutes do not authorize the invasion of a home in order to effect the arrest, and in such cases the constitutional protection afforded an individual

> "to be secure in their persons, houses, papers and effects, against unreasonable searches and *seizures*, shall not be violated."[9]

Furthermore, the protection afforded by the Fourth Amendment is not restricted to *search* warrants, inasmuch as the word *search* does not appear in the Amendment. It further provides that

> "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the *persons* or things to be seized."

The word "persons" as appears in the Amendment evidences an apparent intention by the framers of the Constitution to afford the entire protection of the Amendment to extend to all types of searches, both for *property* on ordinary search warrants and for *persons* on ordinary arrest warrants.

It would therefore be incongruous, to say the least, that enforcement officers should be prohibited from making a search for *property* in a house without first securing a proper and valid warrant, and under the same circumstances would not be prohibited from making a search for a *person* in a house without a warrant.

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9. Fourth Amendment, U. S. Constitution.

The government attempts to justify the seizure by the lawfulness of the search, and to justify the lawfulness of the search by the validity of the arrest; *an arrest which admittedly could only have been justified by the lawfulness of the search.* They therefore seek to justify *one unlawful act by committing two* and contending the right to a third.

SEIZURE NOT INCIDENTAL TO ARREST

A seizure of property, to be within the framework of the Fourth Amendment, must be reasonable and lawful. When founded upon a valid warrant its lawfulness is presumed; where not founded upon a valid warrant its unlawfulness is presumed, and the burden is cast on the party claiming its lawfulness to prove it and to thus rebut the presumption.

Only two exceptions have been recognized to render a seizure of property without a search warrant valid, to-wit: (1) incidental to a valid arrest and (2) in exceptional circumstances. One of the main exceptions to a seizure without warrant is where the seizure is incidental to a lawful arrest. Where the arrest is actually made upon a valid warrant of arrest, and the seizure is shown to be incidental thereto such seizure is prima facie lawful; where the arrest is actually made without a valid warrant of arrest the lawfulness of the arrest on some legal ground must be proved before the seizure can be held valid. In neither of these instances, however, can it be contended that a seizure made incidental to a valid arrest is, in any sense, lawful where the basis of the seizure, i.e. the lawful arrest, has never actually been consummated but merely

that the agent making the seizure had *intended* to make an arrest.

Probable cause to believe that a felony has been committed may authorize a federal agent to make a valid arrest without a warrant, and, as an incident to such an arrest the agent may seize property under the control of the arrested person; however, in such instance the seizure of the property is made to depend initially on the *fact of the arrest,* and not the *right to make the arrest* because of the probable cause.

In other words, *having probable cause* to believe that a felony has been committed may authorize the agent to *make* the arrest, and the fact of *having made the arrest* in turn may further authorize the agent to seize the property, but where the arrest is never in fact consummated there is no valid basis in law to justify the seizure. In such event the seizure would, in reality, have been dependent on the probable cause and not the arrest, and, where dependent on the probable cause the practicability of procuring a search warrant becomes an issue.

CONCLUSION

The contention made by the government that the seizure of the contraband was made after a search of the petitioner's home incident to their attempting to arrest him on probable cause to believe that he had committed a felony, when they had ample opportunity to procure a valid warrant of arrest and offered no excuse in failing to do so, are without merit and the judgment

of the Court of Appeals affirming the District Court should be reversed.

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